Re Tengku Reza Shah bin Tengku Chaidzir Shah; ex parte Panglobal Properties Sdn Bhd

HIGH COURT (JOHOR BAHRU) — BANKRUPTCY NO 29–1500 OF 2005
HUE SIEW KHENG JC
31 JULY 2009

Bankruptcy — Petition — Opposition to petition — Debtor's notice of intention to oppose petition duly served on judgment creditor — Receiving order and adjudicating order subsequently made without judgment debtor's knowledge — Whether judgment debtor entitled to be heard in opposition

Bankruptcy — Petition — Service — Substituted service of creditor's petition — Notice of intention to oppose petition served on judgment creditor — Whether judgment creditor aware of judgment debtor's current address and address of his solicitors — Whether order for substituted service irregularly obtained

The judgment debtor ('JD') came to know that a bankruptcy notice was advertised in the 'Sun' newspaper on 7 July 2006. He therefore filed a notice by debtor of intention to oppose the bankruptcy notice (Form 16 notice) (encl 9) and served the same on the judgment creditor's ('JC') solicitors through his solicitors sometime in July 2006. It was also served on the Insolvency Department. The JD's personal address was stated in encl 9. Nothing transpired after that until the JD received a letter dated 26 November 2008 from the Insolvency Department stating that receiving order ('RO') and adjudicating order ('AO') had been made against him on 11 November 2008. The JC had applied for substituted service of the bankruptcy notice ('BN') and creditor's petition ('CP') and had obtained the aforesaid orders without the JD's or his solicitor's knowledge. The learned deputy registrar set aside the RO and AO upon the JD's application. The JC appealed against this decision. The issues arising for determination were: (i) whether encl 9 should have been heard inter partes and determined before the CP was heard; and (ii) whether the application for the order of substituted service and the subsequent advertisement of the CP in the newspaper were good.

Held, dismissing the appeal with costs:

(1) The fact that the Form 16 notice had been filed by the JD indicating

his intention to oppose the CP and served on all the parties clearly entitled him to a right to be heard at the hearing of the CP. This right was denied to the JD (see para 19).

(2) In the Form 16 notice the JD had clearly stated his address to be No 32, Jalan Sutera Jingga 8, Taman Sutera, 81200 Johor Bahru, Johor. Despite this, the JC had purportedly attempted service at No 48A, Jalan Sultanah Rogayah, Taman Iskandar, 80050 Johor Bahru, Johor. The order for substituted service was clearly irregularly obtained as the JC had willfully chosen not to serve or attempt to serve the JD at his stated address. No attempt was also made to serve the BN and CP through the JD's counsel although they were on record. The JC had not disclosed any reason why it did not attempt to serve the JD at his stated address (see paras 21–22).

(3) In view of the fact that the Form 16 notice was filed and served on all the relevant parties but the JD was not heard because the CP was served on him by way of substituted service, the RO and AO were correctly set aside by the learned deputy registrar, particularly when the order for substituted service was irregularly obtained (see para 23).

[Bahasa Malaysia summary

Penghutang penghakiman ('JD') mendapat tahu tentang notis kebankrapan yang diiklankan dalam akhbar 'Sun' pada 7 Julai 2006. Dia memfailkan notis oleh penghutang tentang niat menentang notis kebankrapan (notis Borang 16) (lampiran 9) dan menyerahkanya kepada pemiutang penghakiman ('JC') peguam cara melalui peguam caranya sekitar bulan Julai 2006. Ianya juga diserahkan kepada Jabatan Insolvensi. Alamat peribadi JD dinyatakan dalam lampiran 9. Tidak ada apa-apa berlaku selepas itu sehingga JD menerima surat bertarikh 26 November 2008 daripada Jabatan Insolvensi yang menyatakan perintah penerimaan ('RO') dan perintah penghukuman ('AO') telah dibuat terhadap beliau pada 11 November 2008. JC telah memohon untuk serahan-serahan notis kebankrapan ('BN') dan petisyen pemiutang ('CP') secara penyampaian ganti dan telah memperolehi perintah-perintah itu tanpa pengetahuan JD atau peguam caranya. Timbalan pendaftar mengetepikan perintah RO dan AO atas permohonan JD. JC merayu terhadap keputusan ini. Isu-isu yang timbul untuk diputuskan adalah: (i) sama ada lampiran 9 seharusnya didengar dalam kehadiran kedua-dua pihak dan diputuskan sebelum pendengaran CP; dan (ii) sama ada permohonan untuk perintah penyampaian ganti dan pengiklanan CP dalam akhbar adalah sah.

Diputuskan, menolak rayuan dengan kos:

(1) Fakta bahawa notis Borang 16 telah difailkan oleh JD menunjukkan

niatnya bagi menentang CP dan menyerahkannya kepada kesemua pihak-pihak dengan jelas memberikannya hak untuk didengari di perbicaraan CP. Hak ini dinafikan kepada JD (lihat perenggan 19).

(2) Dalam notis Borang 16 JD telah dengan jelas menyatakan alamatnya sebagai No 32, Jalan Sutera Jingga 8, Taman Sutera, 81200 Johor Bahru, Johor. Walaupun begitu, JC mendakwa membuat cubaan serahan di No 48A, Jalan Sultanah Rogayah, Taman Iskandar, 80050 Johor Bahru, Johor. Perintah untuk penyampaian ganti adalah jelas diperolehi di luar aturan kerana JC dengan sengaja memilih untuk tidak menyerahkan ataupun membuat cubaan serahan ke atas JD pada alamat yang dinyatakannya. Tiada juga cubaan serahan BN dan CP dibuat melalui peguam JD walaupun perlantikan mereka dicatatkan. JC tidak menyatakan alasan mengapa ia tidak cuba menyerahkan kepada JD pada alamat yang dinyatakannya (lihat perenggan 21–22).

(3) Memandangkan fakta bahawa notis Borang 16 telah difailkan dan diserahkan kepada semua pihak yang berkaitan tetapi JD tidak didengar kerana CP diserahkan kepadanya secara penyampaian ganti, perintah RO dan AO diketepikan dengan betul oleh timbalan pendaftar yang bijaksana, terutamanya apabila perintah untuk penyampaian ganti diperolehi di luar aturan (lihat perenggan 23).]

Notes

For cases on opposition to petition, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2763–2781.

For cases on service, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2796–2801.

Cases referred to

Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Isahak [2005] 2 CLJ 809, FC (folld)

Dato' Sri Teong Teck Leng v Jupiter Securities Sdn Bhd [2004] 1 MLJ 1; [2003] 5 AMR 672, CA (refd)

Legislation referred to

Bankruptcy Act 1967 s 105(1)

Bankruptcy Rules 1969 rr 18, 95, 110, 117, Form 16

K Bimalarajah (KB Rajah & Co) for the judgment debtor.
Subramaniam (NK Tan & Rahim) for the judgment creditor.
Azmi bin Mashood (Department of Insolvency Malaysia).

Hue Siew Kheng JC:

[1] On 19 January 2009 the learned deputy registrar set aside the receiving

and adjudicating orders ('RO' and 'AO') dated 11 November 2008 on the application of the judgment debtor vide encl 22. The judgment creditor now appeals against the said decision.

BACKGROUND FACTS

[2] The facts of the case according to the respondent are as follows.

[3] The judgment debtor came to know that a bankruptcy notice was advertised in the 'Sun' newspaper on 7 July 2006 and as a result he filed a notice by debtor of intention to oppose the bankruptcy notice, ie encl 9 and served the same on the judgment creditor's solicitors through his solicitors sometime in July 2006. It was also served on the insolvency department. He was, it (sic) to be noted, represented by his solicitors Messrs KB Rajah & Co. His personal address was also stated in the said notice by debtor of intention to oppose the bankruptcy notice.

[4] Nothing transpired after that until the judgment debtor received a letter dated 26 November 2008 from the insolvency department stating that receiving and adjudicating orders had been made by judgment creditor against him on 11 November 2008 and that he was to communicate with the officers of the said department. It was subsequently discovered that the judgment creditor had applied for substituted service of the petition and obtained the aforesaid orders without the knowledge of the judgment debtor and/or his solicitors who were at all material times on record.

THE APPELLANT'S CONTENTION

[5] The appellant contends that in an application to set aside the RO and AO, the judgment debtor has to bring himself within one of the three limbs of s 105(1) of the Bankruptcy Act 1967.

[6] Section 105(1) provides as follows:

> Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.

[7] Hence, the three instances where the court may annul the adjudication are:

(a) when in the opinion of the court a debtor ought not to have been adjudged bankrupt;

(b) where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full; or

(c) where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that distribution ought to take place in that country.

[8] It is obviously the first limb that is relevant in this case.

He ought not to have been adjudged bankrupt

[9] In respect of the first limb ie that he ought not to have been adjudged bankrupt in the first place, it was submitted by the appellant that service of the bankruptcy notice ('BN') and creditor's petition ('CP') were effected on the debtor by way of substituted service. It was submitted that 'or for any other cause' as provided in r 110 of the Bankruptcy Rules 1969 rendered the substituted service effected good in law. It was also argued that if personal service is not possible for any reason, substituted service is as good as personal service. The case of *Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Isahak* [2005] 2 CLJ 809 was cited in support.

[10] The appellant further submitted that since the BN was properly served on the debtor, it was incumbent upon the debtor to do one of two things ie to comply with r 95 of the Bankruptcy Rules 1969 which is to file an affidavit within the prescribed time limit or to apply under r 18 of the Bankruptcy Rules 1969.

[11] It was contended that the 'Notis oleh Si Berhutang Mengenai Cadangan Hendak Membangkang Notis Kebankrapan' ('encl 9') which was filed did not comply with r 95 or r 18.

[12] Rule 18 is a general rule providing that applications to the court shall be made by summons in chambers supported by affidavit, except where otherwise provided.

[13] Rule 95 provides as follows:

(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

[14] It was further contended that even if the 'Notis' was an affidavit, it did not constitute a notice of intention to oppose the CP under r 117 of the Bankruptcy Rules 1969 and therefore, the RO and AO were regularly obtained.

THE RESPONDENT'S SUBMISSION

[15] It is the respondent's position that there are only two issues to be determined in this appeal and they are:

(a) whether encl 9 should have been heard inter partes and determined before the petition was heard inter partes and receiving and adjudicating orders granted on 11 November 2008 as the judgment debtor had been represented by his solicitors from the initial bankruptcy notice stage; and

(b) whether the application for the order of substituted service and the subsequent advertisement of the petition in the newspaper were good in the light of the fact that the judgment debtor was represented by solicitors at all material times and of which the judgment creditors solicitors were aware of from the very beginning of this bankruptcy proceedings.

[16] Upon perusal of the relevant cause papers and the submission filed herein, I am in agreement with learned counsel for the respondent that the issues as raised by the respondent are material and pertinent in this appeal.

[17] The respondent has submitted that the 'Notis' filed by the respondent ie encl 9 has to be heard and disposed of before any petition is heard and subsequently RO and AO granted. Enclosure 9 is as earlier stated, entitled 'Notis oleh Si Berhutang Mengenai Cadangan Hendak Membangkang Notis Kebankrapan'. It is in form and substance similar to Form 16 as provided in the Bankruptcy Rules.

[18] Rule 117 expressly provides that:

> Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

The notice referred to in r 117 is the Form 16 notice

[19] It is not disputed that encl 9 was filed on 13 July 2006 and served on all the parties.

[20] In the case of *Dato' Sri Teong Teck Leng v Jupiter Securities Sdn Bhd* [2004] 1 MLJ 1; [2003] 5 AMR 672 the Court of Appeal held (at p 8 (MLJ); p 679 (AMR)):

> In the instant case, a notice of intention to oppose the creditors petition pursuant to r 117 was filed. That would be sufficient to entitle the debtor to oppose the petition. He does not have to file further a summons in chambers for the purpose.

[21] The fact that the Form 16 notice had been filed by the debtor indicating his intention to oppose the petition and served on all the parties clearly entitles him to a right to be heard at the hearing of the petition. This right was denied to the respondent

[22] The second issue raised is with regard to the application for the order for substituted service ('encl 16') and the subsequent advertisement of the petition in 'the Sun' newspaper. Enclosure 16 was filed on 10 December 2007. The Form 16 notice, which was served on the appellant was filed on 13 July 2006.

[23] In the Form 16 notice the debtor had clearly stated his address to be No 32, Jalan Sutera Jingga 8, Taman Sutera, 81200 Johor Bahru, Johor.

[24] Despite the debtor's disclosure as to his current address, the respondent had purportedly attempted service at No 48A, Jalan Sultanah Rogayah, Taman Iskandar, 80050 Johor Bahru, Johor. The order for substituted service was clearly irregularly obtained as the appellant had willfully chosen not to serve the respondent at his stated address and in fact did not even attempt to do so. No attempt was also made to serve the BN and CP through the respondent's counsel although they were on record. They instead chose to rely on information obtained from the national registration department. The appellant has not disclosed any reason why it did not attempt to serve the respondent at his stated address. This clearly does not fall within the meaning of substituted service being as good as personal service as held in *Bungsar Hill*.

[25] In view of the fact that the notice of intention to oppose was filed and served on all the relevant parties but the respondent was not heard because the CP was served on him by way of substituted service the RO and AO

granted on 11 November 2008 were correctly set aside by the learned deputy registrar, particularly when the order for substituted service was irregularly obtained.

[26] The appeal is hereby dismissed with costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum